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April 24, 2014

***, Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION
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RE: **FINAL REPORT** for In the Matter of ***, 2014-02, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education laws.

This is the Final Report pertaining to the above-referenced State Special Education Complaint filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. (Complainant) filed the complaint on behalf of her child, (Student), a student in *** Public Schools (the District). Complainant asserts the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et. seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulations at 34 CFR Part 300 and ARM 10.16.3007 et seq., by allegedly:

- (1) failing to evaluate Student in all areas related to suspected disability;
- (2) failing to provide Student transportation as a related service on Student's April 15, 2013 IEP;
- (3) failing to provide Student with a one-on-one aide to meet Student's extensive assistance needs;
- (4) failing to appropriately consider Student's needs under the "special factors" section of the April 15, 2013 IEP;
- (5) failing to complete transition assessments to properly write post-secondary goals and provide transition services to meet those goals;
- (6) failing to determine appropriate present levels of academic and functional performance (PLAAFP) and measurable IEP goals in reading and math on Student's April 15, 2013 IEP;
- (7) by denying Student a free appropriate public education (FAPE) because Student's 2013 IEP was not reasonably calculated to provide educational benefit.

A. Procedural History

1. On February 24, 2014, the Montana Office of Public Instruction (OPI) received a Special Education Complaint (Complaint).
2. The OPI Early Assistance Program found the parties were unable to resolve their issues within 15 business days of the date of the Complaint. The Complaint proceeded to investigation.
3. The OPI received a written Response to the Complaint on April 1, 2014.
4. An appointed investigator conducted interviews with: Complainant (Student's mother), Complainant's advocate, Student's private speech therapist; Student's family support specialist, the District superintendent, special education director, high school principal, case manager, two special

education teachers, physical therapist, occupational therapist, speech and language therapist, and Student's one-on-one aide.

B. Legal Framework

The OPI is authorized to address alleged violations, which occurred within one year prior to the date of a complaint, of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR §§ 300.151-153 and ARM 10.16.3662. Pursuant to 34 CFR §§ 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination must be made as to whether a violation of federal or state statute or regulation occurred.

C. Findings of Fact

Background

1. Complainant is Student's mother and has standing to file this Complaint under the Montana special education complaint process at ARM 10.16.3661.
2. Student was 17 years old at the time the Complaint was filed and was enrolled in 10th grade with the District.
3. Student transferred into the District from another state and enrolled on March 26, 2012.
4. Student spent the first three years of her life in a Spanish-speaking home and at age six began living with Complainant who adopted her at eight years old. At that time the family moved out of the country and Spanish became Student's primary language. The family returned to the United States for approximately one year during that time to seek medical attention and permanently returned to the United States when Student was 15 years old.
5. Letters from Student's doctors and a psychoeducational evaluation from 2008 indicate Student was diagnosed with Rett's Syndrome, a neuromuscular disorder. Student was exposed to drugs and alcohol in utero and has a history of seizures, has leg braces, uses a wheelchair for mobility at times, and has auditory and cognitive issues among other medical concerns.
6. The District implemented the Student's transfer IEP as amended on April 2, 2012. Student was found to be eligible for special education services under the category of intellectual disability.

2012 IEP

7. On May 21, 2012 the District held an IEP meeting and an IEP was developed for Student.
8. The May 21, 2012 IEP indicated Student needed to be reevaluated. Her last comprehensive evaluation had been in 2008, and the reevaluation would occur in the fall of 2012. The District did not perform a reevaluation in the fall of 2012.
9. The May 21, 2012 IEP special factors indicated Student's behavior impeded her learning or that of others and that Student has communication needs and requires assistive technology devices or services.
10. Student's May 21, 2012 IEP does not state what assistive technology Student will use. The only reference to possibly using assistive technology is made in a communication goal, "[Student] will utilize some form of ACC (pictures, device, keyboard) or verbal language in order to make two requests during the school day, to get her wants and needs met."

2013 IEP and 2013-2014 School Year

11. Student's IEP team met April 15, 2013 to review her IEP. Complainant signed this IEP with an exception to the physical therapy goal.

12. The April 15, 2013 IEP notes parent's educational concerns as "[Student] needs to wear ear filters provided by Dr. of Audiology. Parent has concerns with stairs as they cause her legs to swell, so no stairs until we hear otherwise because of episodes of collapse at home and other places outside of school." The school staff's educational concerns note: "If there were a way for us to help her pay attention for more than a few seconds at a time, this teacher would really like to know it. Mom says her ear filters will help with distraction."
13. The District does not have a health care needs plan for Student.
14. Student's April 15, 2013 IEP is silent regarding Student's use of leg braces.
15. Unlike the prior IEP, the April 15, 2013 IEP did not indicate Student's behaviors impeded her learning or that of others.
16. The staff still had major concerns about Student's violent behaviors. Throughout the first three quarters of the 2013-2014 school year, there are several accounts in the one-on-one aide's daily notes and the special education teacher's notes that indicate Student was aggressive and violent toward her aide and that the behavior frightened other students. Student's violent behavior also prevented her from taking the school van on class outings. The teacher's October 2013 notes indicate she would try to put Student on a behavior plan.
17. Throughout the first three quarters of the 2013-2014 school year, staff observed Student to be very distractible during class and it was difficult to get her to do tasks or respond. Student would often fall asleep.
18. The April 15, 2013 IEP special factors list communication needs and assistive technology devices or service needs.
19. The April 15, 2013 IEP does not describe what assistive technology Student will use at school. The only reference to its use is in a communication goal, "given access to icon's for 'bathroom' and 'drink,' [Student] will independently either hand over one or the other or point to the icons on her iPad to indicate a current need..."
20. In the April 15, 2013 IEP, Student was to have supplementary aids and services, a modified curriculum in band, modified grading, and a paraprofessional available one-on-one in general education classes.
21. The District assigned a one-on-one aide to Student throughout her school day.
22. The April 15, 2013 IEP indicated Student needed to be reevaluated.
23. The District did not reevaluate Student during the 2013-2014 school year.
24. The April 15, 2013 IEP notes state:
 - a. "[Complainant] is concerned that [Student] is out of her chair more than she should be. Should only be out for 10-15 minutes per hour."
 - b. "We want to increase [Student's] self care. We do a Vineland Assessment to find out more in this area."
 - c. "Parent has expressed an interest in [Student] taking a Spanish class. We will revisit this after testing using LEP, Limited English Proficient with the WAPT test."
 - d. "[Student] had a Vineland last May and will need to have it redone before she turns 18."
 - e. "Evaluation will take place after results of neurological evaluation from May 9, 2013 is available to district."
25. Complainant requested that Student be allowed to attend the general education Spanish class during the 2013-2014 school year. Student did not attend the class because the classroom was not accessible and the course was not moved to an accessible location. The District assigned Student's Spanish-fluent one-on-one aide to teach her Spanish individually using a textbook from the regular

education Spanish class and strategies devised by the aide. Student was not provided the opportunity to participate in conversational Spanish with other students.

26. Transportation was intermittently provided to Student by the District. Transportation was not listed as a related service on Student's April 15, 2013 IEP, which was an oversight according to the District. Student was not provided transportation for the first couple of months of the school year because the District did not have a bus driver. The bus service was sporadic throughout the fall.
27. The April 15, 2013 IEP provided for a speech and language therapist to meet with student for 45 minutes per week. However, speech and language services were not listed as a related service on the IEP. The District also indicated this was an oversight. The IEP classified them as special education communication services.
28. Despite the proposed weekly speech and language therapy services, the speech aide met only twice with Student, once on December 13, 2013 and once on January 10, 2014. The speech therapist did not meet with Student during the 2013-2014 school year until after this Complaint was filed. The scheduled speech and language sessions were on Fridays. There were approximately 25 weeks of school prior to the time Complainant filed the Complaint of which Student attended school approximately ten Fridays and had the two speech services sessions. The District failed to provide eight sessions of scheduled speech services sessions.
29. Student's communication, reading and math PLAAFPs do not describe her present level of performance. Student's math and reading goals lack adequate specificity.
30. Student's April 15, 2013 IEP does not state what transition assessments were performed, if any, and what the results were from those assessments.

Evaluations

31. A former district performed a speech evaluation and a psychoeducational evaluation on Student on October 7 and 8, 2008. Complainant provided the District with these evaluations.
32. A former district obtained consent from Complainant on September 16, 2011, to evaluate Student in the areas of fine motor and gross motor and some results of the gross motor testing were listed on the former district IEP dated September 16, 2011¹
33. On May 22, 2012, the District's school psychologist performed the TONI-4 on Student concluding she performed in the "very poor intellectual" range. On May 31, 2012, the District with Complainant serving as the informant, administered a Vineland-II adaptive behavior scales on Student.
34. On April 11, 2013, the Student's teacher administered the Casey Life Skills assessment with Complainant serving as the informant. No specific results from the assessment were obtained as the teacher used it more as an interview.
35. The District did not assess Student for communication, speech and language, or assistive technology needs.

Complainant Attempts at Resolution

36. On December 5, 2013 Complaint sent a letter via email to the District's superintendent apprising him of her concerns with Student's educational struggles at the high school. Complainant stated concerns including the District was not using the iPad for communication, English as a second language for Student and frustration regarding Student's mobility concerns.
37. The District superintendent replied by email on December 6, 2013, letting Complainant know he was contacting the principal and special education director who would address her concerns. Complainant met informally with them to discuss her concerns but the issues were not resolved.

¹ It is noted the copy provided of the September 16, 2011 is not signed by complainant. The gross motor testing that was included on the IEP was dated September 30, 2011.

38. On January 21, 2014, the OPI provided a monitor to assist the parties with regard to Complainant's concerns that the District was not using the iPad with Student for communication, failed to conduct an assistive technology evaluation as agreed at the 2013 IEP meeting, Student's lack of learning, and the need for communication with the teacher. Suggestions were made to the District for improvement, but the District did not share these with Complainant.

Mobility, audiology, leg braces

39. Complainant provided the District a copy of a letter dated January 12, 2012, from a doctor in their previous state of residence, stating Student's Rett's Syndrome limits her exercise tolerance, creates some instability while walking (requiring a wheelchair during school hours), and that Student will require assistance going up and down stairs.
40. Complainant provided the District a copy of a letter dated April 12, 2013, from Student's clinical audiologist recommending that Student wear sound attenuating earplugs in situations where noises were potentially bothersome. The District did attempt to use the ear plugs, but reports Student would not leave them in. Complainant disputes this noting that Student will leave earplugs in during church and places where noises bother her. The IEP did not address the use of earplugs.
41. The parties dispute the extent of movement and mobility Student should engage in at school. The teacher and PT/OT argued for less wheelchair time and more use of stairs. Complainant wanted use of the wheelchair at all times at school.
42. Complainant provided a letter for IEP team consideration from one of Student's doctors dated April 15, 2013. The letter reported that one manifestation of Rett's Syndrome is declining neuromuscular status. The doctor's letter stated Student may ambulate as tolerated between classrooms, use stairs when accompanied by an aide, be provided wheelchair assistance when necessary, and cautioned that his recommendations would be subject to reevaluation at least quarterly. The District denied receiving a copy of this letter.
43. The physical therapy PLAAFP for the 2013 IEP states Student navigates from her classroom throughout the building and back within her allotted 10 minutes of standing and suggests Student use the wheel chair during classes. It states regular movement throughout the day would be helpful, but that a wheelchair should be provided on days where she is fatigued or in pain. Complainant objected to these recommendations and signed the IEP with exceptions.
44. A third, conflicting letter dated May 21, 2013, by a different doctor was then provided by Complainant stating that due to Student's level of functioning she would walk only short distances and should be permitted to use her wheelchair for mobility if she is fatigued and having leg pain. It further states she should not use the stairs due to safety concerns.
45. The District questioned these recommendations because school staff would often see Student out in the community walking around, but they did not require Student use the stairs during the 2013-2014 school year.
46. Complainant provided a letter dated August 20, 2013 from Student's certified pedorthist regarding Student's ankle braces and the need to monitor them throughout the day due to edema issues. It stated the braces were not meant for walking in.
47. The IEP did not contain any reference to the braces and controversy arose when Student's feet became swollen, and sometimes bled at school. The aide did not know about the braces and the teacher expressed that she did not have time to check them.
48. After the Complaint was filed, Complainant submitted two more letters dated March 12 and March 17, 2014 from a fourth doctor stating Student needs to be in her wheelchair for all but 10-15 minutes at a time, thus conflicting with the second doctor's letter indicating a 5-10 minute time-frame. The letter also indicated Student's legs need to be elevated when not walking.

49. No evaluation, IEP meeting, or amendment was done to address these conflicting recommendations.

Attendance

50. During the 2013-2014 school year Student had a significant amount of absences, attending school about 42% of the time and missing 80 days during the first three quarters.² Of these 80 days, approximately half were medically excused absences.
51. The District's principal told Complainant if Student could not come to school because of the lack of transportation, the District would not hold the absences against her. Frequently, Complainant was unable to get Student's wheelchair out of her car and over the lip of the doorway when she would take her to school because of Complainant's shoulder injuries.

Progress

52. The District produced minimal data and assessments documenting progress on Student's IEP goals for the 2013-2014 school year.

D. Analyses and Conclusions

Issue 1: Did the District fail to reevaluate Student in all areas of suspected disability and fail to indicate in the IEP services it did provide to Student?

Student is diagnosed with a seizure disorder, complications from exposure to drug and alcohol use in utero, and Rett's Syndrome, a degenerative neurologic disorder which may cause regression in certain areas. Complainants allege the District erred when it failed to assess Student in all areas of suspected disability including assistive technology, communication and speech, occupational therapy, and physical therapy to determine her current educational needs.

Mobility Limitations

While not stated in the IEP, the District questioned several medical determinations such as how long Student was able to walk or stand, Student's use of a wheelchair, whether Student was able to go up and down stairs, and Student's teacher questioned the Rett's Syndrome diagnosis. The 2013 IEP mentions parent's educational concerns as: "Parent has concerns with stairs as they cause her legs to swell, so no stairs until we hear otherwise because of episodes of collapse at home and other places outside school." The IEP notes state "[Complainant] is concerned [Student] is out of her chair more than she should be." This was a source of contention as District staff did not agree with Complainant's mobility recommendations or the various doctors' letters dated January 12, 2012, May 21, 2013 and April 15, 2013. However, the letters do not give specific time limits and some of the recommendations are contradictory as to Student's physical abilities. The April 15, 2013 letter does state, due to her Rett's Syndrome diagnosis, Student needed to be reevaluated at least once a quarter to determine her physical abilities.

Ankle Braces for Support

Student wears ankle braces which Student's pedorthist recommended be checked throughout the day to avoid edema (swelling) as per a letter dated August 20, 2013. The investigation revealed Student's one-on-one aide had not been told about the ankle braces at the beginning of the school year and questioned

² Attendance from the 4th quarter was not examined. Student transferred out of state and was unenrolled from the District around 4/8/14.

her responsibility to check them when confronted by Complainant in early September, 2013. The teacher's September 6, 2013 notes reflect that she did not check the braces either: The investigation revealed Student's legs sometimes swell so badly the skin breaks and causes bleeding. The IEP did not address the ankle braces.

Sound-Attenuating Earplugs

An April 12, 2013 letter provided to the District from Student's clinical audiologist recommending that Student wear "sound-attenuating" earplugs in situations where noises are potentially bothersome. District staff appeared to know about the ear filters and have Student use them, but no reference was made to them in the IEP except as referenced in parent's education concerns which stated "[Student] needs to use ear filters provided by Dr. of Audiology."

Speech and Communication

Student's last formal speech evaluation was in 2008. The District provided speech services of 45 minutes per week during the 2012-2013 school year. The District alleged Student continued these services during the 2013-2014 school year but they were classified as communication services. The District's speech therapist did not meet with Student in 2013-2014 until after the Complaint was filed and during the investigation stated she thought use of an iPad is too complicated for Student. The April 15, 2013 IEP team demonstrated a lack of clarity about Student's performance levels, but the speech therapist expressed that she did not think there was a way to formally assess Student. No communication or speech therapy assessments were performed on Student.

Reevaluation

Student's May 21, 2012 and April 15, 2013 IEPs both indicate the IEP team agreed Student needed to be reevaluated. Further, staff continued to disagree with the professional diagnoses, which indicate some clarification was needed. The IEP did not address services for any of the above-discussed physical limitations which also affected the services Student needed to progress in her education. Student's last comprehensive evaluation occurred out-of-state in 2008 when Student returned to the United States for approximately one year due to medical concerns while living abroad. Student more permanently returned to the United States in 2011. A former out-of-state school district reevaluated Student on September 16, 2011, but only in the areas of fine and gross motor.³ Student attended the former district for less than a year before moving to the current District. Under the IDEA, the District has a responsibility to make sure a student is assessed in all areas related to the suspected disability or disabilities. 34 CFR §300.304(c)(4).

A reevaluation must be conducted if a public agency determines the educational or related service needs of a student warrant a reevaluation or a parent or teacher requests a reevaluation. 34 CFR §300.303(a). An *initial* evaluation must be conducted within 60 days of receiving parental consent pursuant to 34 CFR §300.301(c)(1)(i), but the IDEA has no similar time requirement for reevaluations pursuant to 34 CFR § 300.303. The standard for timely completion of a reevaluation is within a reasonable timeframe, to be determined on a case by case basis. *OSEP Letter to Saperstone*, 21 IDELR 1127 (OSEP 1994). "Though vague, the interpretation of the IDEA requiring reasonableness shows that prompt resolution of

³ The results to these assessments were not given to the current District. Some results of the gross motor testing were listed on the September 16, 2011 IEP.

disputes involving the educational placement of learning disabled children is imperative.” *Herbin v. District of Columbia*, 362 F. Supp.2d 254, 259-260 (D.C.C. 2005).

Student’s April 15, 2013 IEP notes discuss the need for Student to be assessed with “the Vineland” and assessed for limited English proficiency. The notes indicate that an evaluation will occur after the District receives the May 9, 2013 neurological evaluation report. The District never did reevaluate Student. The District responds that they did not received a copy of the May 9, 2013 neurological evaluation from Complainant. However, this does not negate the District’s duty to reevaluate. The District remained responsible to ensure Student was properly reevaluated by qualified professionals in all suspected areas of disability. The District also remained responsible to ensure that the IEP thoroughly addressed all physical needs of the Student that arose during the school day. A complete reevaluation would have aided the IEP team in successfully addressing Student’s many needs and also addressed the conflicting concerns of certain staff. The District’s failure to reevaluate Student in a reasonably timely manner, **violated 34 CFR § 300.303**. The District’s failure to assess Student in all areas of suspected disability also **violated 34 CFR 300.304(c)(4)**.

Issue 2: Did the District err when it did not provide Student transportation as a related service on her April 15, 2013 IEP?

Complainant alleged the District erroneously failed to provide transportation services for the first couple of months of the 2013-2014 school year. Transportation had been listed as a related service on Student’s May 21, 2012 IEP. Transportation is not listed as a related service on Student’s April 15, 2013 IEP. Transportation is a related service pursuant to 34 CFR § 300.34 and includes “[t]ravel to and from and between schools; Travel in and around school buildings; and Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.” 34 CFR §300.34(16). The District agreed that omission of transportation in the April 15, 2013 IEP was an oversight. Thus the District knew of its transportation responsibility, but for various reasons did not provide it.

The District did not have a bus driver for Student’s bus at the beginning of the 2013-2014 school year. The District did not offer alternative transportation services to Student. Student did not receive transportation services for approximately the first two months of school and service was sporadic throughout the fall. Complainant frequently had to transport Student to school. Complainant had shoulder injuries and had difficulty getting Student’s wheelchair into the school without assistance. Organized assistance was not made available. The principal told Complainant if Student missed school due to lack of transportation the absences would not count against Student. This is not an appropriate substitution for providing transportation services. The District eventually obtained a bus driver and provided transportation. Even then, issues arose regarding how she was to safely board the bus and Student being late to the bus. These issues were resolved on a case-by-case basis but should have been addressed in the IEP. The District’s failure to **provide transportation as a related service at the beginning of the year violated 34 CFR § 300.34**. The IEP must also include the use of any necessary specialized equipment and modifications, such as use of a lift or ramp or an aide to escort the Student.

Issue 3: Did the District err by failing to provide Student with a one-on-one aide to meet her extensive assistance needs throughout the school day?

Complainant alleges the District failed to provide a one-on-one aide to meet Student's need for extensive assistance throughout the school day. The level of staffing assistance is an IEP team decision when developing the IEP in accordance with 34 CFR § 300.320 through § 300.324. The IEP must include a statement of special education and related services and supplementary aides and services. 34 CFR § 300.320(a)(4). Supplementary aides and services "means aids, services, and other supports that are provided in regular education classes, other education-related settings and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate..." 34 CFR § 300.42.

Student's April 15, 2013 IEP "supplemental aides and services" provide "[p]ara available on a 1:1 in general education classes." Student did, however, have a one-on-one aide assigned to her throughout her entire school day, not just in her one general education (band) class. The District acknowledges it failed to properly document the IEP team consensus that Student needed adult supervision throughout her entire school day, but the service was nonetheless provided. We **do not find the District in violation of 34 CFR §300.320 through §300.324.**

Issue 4: Did the District err by failing to appropriately consider any "special factors" in the April 15, 2013 IEP?

Pursuant to 34 CFR § 300.324(b)(2), an IEP Team must consider special factors when reviewing a student's IEP. Specifically, the IEP team *must* consider: the behavior needs of the child; in the case of a child who is limited English proficient, consider the language needs of the child; consider the communication needs of the child; and consider whether the child needs assistive technology devices and services. 34 CFR § 300(a)(2)(i), (ii), (iv) and (v). If assistive technology devices are found to be necessary for a student, a district must make sure they are made available to the student. 34 CFR § 300.105(a).

Behavior

As part of the IEP development, the IEP team must consider whether a student's behavior impedes his/her learning or the learning of other students. 34 CFR § 300.324(a)(2)(i). Student had a behavior goal on her 2012 IEP which she failed to meet. It read: "[Student] will increase her ability to remain calm, and increase her task(s) when she gets frustrated, 90% of the time, with the following verbal cues: 1. Identify inappropriate behavior; 2. Give her a verbal cue; 3. Prompt her to complete a task; 4. Verbally encourage and reinforce her behavior; 5. Reward her with a quick break when she completed a task." The 2013 IEP team determined that Student's behavior did not impede her learning or that of others because Student was on medication for behavior and if she had her medicine she did not have any behavioral issues. However, two PLAAFPs on the April 15, 2013 IEP indicate that focus and paying attention were concerns for Student. Specifically, the communication PLAAFP states, "[f]ocus is a big factor in her success in any 'school thing,' and her focus can vary considerably." Education concerns by school staff state "[i]f there were a way for us to help her pay attention for more than a few seconds at a time, this teacher would really like to know it."

The investigation revealed Student displayed several aggressive behaviors against her one-on-one aide during the 2013-2014 school year. Additionally, Student's teacher and one-on-one aide indicated Student had a hard time focusing, was defiant, and would go to sleep to avoid working. The teacher's notes indicate she discussed Student's behavior with Complainant on October 28, 2013, and she planned to put Student on a behavior plan to see if that would help. The teacher noted, "[S]he works for food and finger nail polish at the speech therapist's office at the hospital, but I won't want to have to go to that length here to get work out of her as all the kids will think they need a reward to do what's expected of them." The teacher reported she planned to use the reward of petting a horse (when she got home) to get Student to do her work at school but that didn't materialize because of Complainant. The teacher also reported Student was unable to take school trips in the van due to her violent behaviors.

Student was on medication for behavior on the days she went to school. Complainant reported she did not need medication when she was at home and did not take it over the summer. Student did experience aggressive behavior during menses. Complainant tried a variety of prescription medicines and ways to elevate these medical issues, but nothing has been successful. Student's aide and teacher documented their frustrations with Student's behaviors, but at no time was an IEP meeting held to discuss behavioral interventions, determine what was triggering Student's aggressive behaviors, or how to appropriately address them. The District had an obligation to review these behaviors and address the unique needs of Student. Failure to do so **is a violation of 34 CFR § 300.324(a)(2)(i).**

Limited English Proficient

Student spent the first three years of her life in a Spanish speaking home and moved to a Spanish-speaking country when she was eight years old where Spanish was her primary language. She permanently returned to the United States at 15 years of age. The April 15, 2013 IEP notes indicate the District planned to test Student (using WAPT) to determine if she actually was Limited English Proficient. However, that IEP indicates Student had not been determined to be "Limited English Proficient." The District never tested Student for Limited English Proficiency.

As part of the IEP development, an IEP team must consider the language needs of a child who has limited English proficiency. 34 CFR § 300.324(a)(2)(ii). Limited English Proficiency is defined in Section 9101(25) of the Elementary and Secondary Education Act of 1965. 34 CFR § 300.27. It is clear there were questions regarding Student's language needs as acknowledged by the District's plan to evaluate her. The District argues they asked the Montana OPI to assist in the evaluation but did not hear back. The District remained responsible to ensure Student was evaluated for limited English Proficiency but failed to do so. **The District is in violation of 34 CFR § 300.324(a)(2)(ii).**

Communication

An IEP team must consider a student's communication needs. 34 CFR § 300.324(a)(2)(iv). The Student's April 15, 2013 IEP identifies that Student had communication needs. She is non-verbal and has limited communication skills. Complainant believes communication is Student's biggest area of concern and she alleges the communication PLAAFP is deficient resulting in inappropriate goals. Student's communication PLAAFP reads:

While [Student] has initiated a request earlier this year, on occasion, the life skills teacher has not noticed her doing it recently. It would benefit [Student] if she could indicate what she needs so that she is not so dependent on people anticipating or trying to figure

out what she needs. Focus is a big factor in her success in any “school thing,” and her focus can vary considerably. We have been targeting having her using a symbol on her iPad to make choices during activities in order to give her an option that does not require spelling or use of multiple selections. There will be times when this can work for her with support [much support, often], but too often her attention wanders, and she is less of an active participant than we would like her to be. Using Proloquo to give her a speaking option is something we have tried, though with this, as with other options, she often requires much support. At this time, getting [Student] to initiate a communication (by any means) in order to get her wants and needs met would seem to be the most beneficial target to set for her. A secondary target would be for her to answer “yes/no” questions appropriately by any means (iPad selection, yes/no card [with touch or eye gaze], etc. Getting her to associate meaning with an icon and use it to get her wants and needs met would be a worthy target at this time. While yes/no questions do involve response and not initiation on her part, it is important that she answer appropriately.⁴

An IEP must include a statement of the child’s PLAAFPs including how the child’s disability affects their involvement and progress in the general education curriculum. 34 CFR § 300.320(a)(1). PLAAFPs are to be used to assist with goal development. An IEP begins by measuring a student’s present level of performance to obtain a benchmark for measuring the student’s progress over the course of the IEP. *Ravenswood City School District v. J.S.*, 870 F.Supp.2d 780, 790 (N.D. Ca. 2012) citing *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 508 n. 1 (9th Cir. 2004). Student’s communication PLAAFP does not give a current level of performance. It does not answer “How often has she initiated a request? What type and how much support is she given? What percentage of yes/no questions is she currently able to answer?”

Student’s April 15, 2013 IEP states she would receive 540 minutes per week in the special education setting plus an additional 45 minutes per week in the same classroom for communication. The District Response asserts the 45 minutes per week was to be provided by the District’s speech and language therapist, but the IEP did not state this and the speech therapist did not see Student during the 2013-2014 school year until after the Complaint was filed. The District Response also asserts the District’s speech therapist coordinated services with the private speech therapist. The investigation revealed the District’s speech therapist spoke once with the private speech therapist but they did not devise a plan to coordinate services or discuss Student on a regular basis.⁵

A speech aide did meet twice with Student during the 2013-2014 school year and worked on matching objects to a picture card. Student’s scheduled time for speech therapy was on Fridays. Although Student was absent a lot throughout the year, records show she attended ten Friday’s prior to the time the Complaint was filed but received only two sessions with the aide and never met with the speech therapist prior to the Complaint filing.

⁴ It is noted Student met her 2012 communication goals pursuant to her April 26, 2013 progress report, and that she was able to initiate two requests during the school day to get her needs met. However, the April 15, 2013 IEP PLAAFP indicates Student does not initiate requests. The two sources clearly contradict each other.

⁵ During the 2012-2013 school year, Student’s former aide attended private speech therapy with Student. During the 2013-2014 school year, Student’s aide attended a two private speech therapy sessions and was unable to attend due to personal transportation issues.

The investigation revealed no significant documentation demonstrating Student's present level of communication. A baseline is paramount to enable drafting appropriate goals which are measurable. Without proper evaluations and PLAAFPs, it is impossible to draft appropriate goals and have a starting point to measure them. *See Ravenswood City School District*, 870 F. Supp.2d at 790-791, (The IEP was found to deny FAPE because IEP goals were not predicated upon clear baselines); and *Bend Lapine School District*, 2005 WL 1587241 (D.Or. 2005) (unreported) affirmed by *Bend-Lapine School Dist. v. K.H.*, 234 Fed.Appx. 508 (9th Cir. 2007) (IEP denied FAPE due to lack of baseline data, measurable goals, and a description of services to be provided). The **District violated 34 CFR § 300.201(a)(1)** by failing to create an appropriate communication PLAAFP for Student and failing to provide the communication services called for on the IEP.

Assistive Technology

An IEP team must consider whether the child needs assistive technology devices or services in developing an IEP. 34 CFR § 300.324(a)(2)(v). The IDEA defines an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 34 CFR § 300.5. An assistive technology service means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. 34 CFR § 300.6.

Complainant alleges the District did not properly consider Student's assistive technology needs for the April 15, 2013 IEP. Both Student's May 21, 2012 and April 15, 2013 IEP, indicate Student has assistive technology needs. Except for a brief reference to an iPad in Student's communication goal, the IEP does not address her assistive technology needs or how they would be met. Complainant sent Student's personal iPad to school with her every day for communication purposes. Apparently the District had an iPad in the classroom but it did not have the Proloque2go software Student uses. Other issues resulted from the use of Student's private iPad at school. Although the District reportedly used the iPad throughout the day with Student, it is unclear exactly how they used it. The investigation revealed very little information regarding iPad usage. The speech therapist thought it was too complicated for Student. It is unclear who trained the teacher and the aide to use the iPad with Student, but it by all reports did not help much with Student's communication abilities while at school.

Because the IEP team considered Student to have assistive technology needs, the District was obligated to ensure assistive technology devices and/or services were made available for Student's special education, related services, and supplementary aids and services. 34 CFR §300.105(a). The IEP team identified assistive technology needs starting with the May 21, 2012 IEP, but the District failed to take the next step to determine what assistive technology device or services Student needed **in violation of 34 CFR § 300.105(a)**.

Issue 5: Did the District err when it did not complete any transition assessments on Student to properly write post-secondary goals and provide transition services to meet those goals?

Complainant alleges the District did not appropriately assess Student and therefore could not properly write post-secondary goals and provide transition services to meet those goals in violation of 34 CFR §300.320(b). "Congress in the IDEA placed 'added emphasis on transition services so that special

education students leave the system ready to be full productive citizens, whether they go on to college or a job.” *Carrie I. v. Department of Education, State of Hawaii*, 869 F.Supp.2d 1225, 1244 (D. Haw. 2012) citing 150 Cong. Rec. S11653-01, S11656 (Nov. 19, 2004) (Conf. Rep. accompanying H.R. 1350) (Statement of Sen. Dodd).

Pursuant to 34 CFR §300.320(b), beginning not later than the first IEP to be in effect when the child turns 16, and updated annually, the IEP must include appropriate measurable post secondary goals based upon age appropriate transition assessments related to training, education, employment and where appropriate, independent living skills. The IDEA does not specify the type of transition assessments to be conducted. Specific transition assessments used to measure post secondary goals are dependent upon the individual needs of the child and determined on an individual basis. *U.S. Dept. of Educ. Discussion of the Federal Regulations*, 71 Fed. Reg. 46667 (August 14, 2006).

“Transition Services” and “Results of Age-Appropriate Transition Assessments” must be listed on the IEP. Student’s 2013 IEP reads as follows:

Area Assessed	Results of Transition Assessment listed on 2013 IEP
Training	[Student] will need on the job training and someone working alongside her for any type of work she does.
Education	[Complainant] says [Student] will go into some kind of training school either here or at Guatemala. [Complainant] could like her to start a business with assistance.
Employment	[Complainant] says we will have to see when the time comes what kind of work [Student] will do.
Independent Living	[Student] will always need help. We want to increase [Student’s] self-care and independent living skills. [Student] lives as independently as possible. She bathes herself, dresses herself, cleans house, heats her lunch in the microwave and just takes part in anything we do in class or anything outside of class she is capable of doing. [Complainant] is very good about insisting [Student] do things herself if at all possible.

The above “Results” do not state if, or how, Student was assessed or what was learned from any assessment. The District Response asserts that soon after Student entered the District, on May 3, 2012, they completed a Vineland adaptive behavior assessment (which rates functional skills) with Complainant serving as the informant. The 2013 “Results” do not refer to this test and, while there was reference to redoing it in 2013, the District did not do so. Assessments must be updated annually to be kept current. 34 CFR §300.320(b). Student’s case manager reports that on April 11, 2013, she had Complainant fill out the Casey Life Skills Questionnaire for the April 15, 2013 IEP meeting. The manager said she used the Questionnaire “more like an interview” and “considered” the information when drafting the 2013 IEP. The investigation revealed that no actual assessment results were calculated using the Casey Life Skills Questionnaire, and no age appropriate transition assessments were done for Student’s 2013-2014 IEP.

Further, Student's 2013-2014 transition goals are rather vague and will be difficult to measure.⁶ While the substance of the goals may be appropriate for Student, failure to perform adequate transition assessments make it difficult for an IEP team to accurately determine whether the goals are adequate. Additionally, the IEP in effect after a child's 16th birthday must contain transition services including courses of study needed to assist students in reaching their post-secondary goals. 34 CFR §300.320(b)(2). A review of the IEP's transition services indicates they may be appropriate for Student, but again, because appropriate transition assessments were not performed, the determination of needed services was merely speculative. The District Response seems to agree when it states that "[t]here are other age appropriate assessment that would better identify [Student's] transition needs and post secondary goals. With her limited communication, trial and error and observations will be helpful. The IEP team will need to determine appropriate methods and tools."

Key to this and other issues in this report is the lack of clarity regarding Student's communication deficits, strengths, and cognitive delays. Traditional methods of assessment do not work for Student. Therefore, the District had a responsibility to work to determine effective assessments so they could create appropriate post-secondary goals and services for Student. See *Carrie I.*, 869 F.Supp.2d at 1245; *Dracut v. Bureau of Special Education Appeals of Mass. Dept. of Elementary and Special Ed.*, 737 F. Supp.2d 35, 50-51(D. Mass. 2010) (failure to provide measurable post-secondary goals based on timely transition assessments is a violation of IDEA). **The District's failure to perform age appropriate transition assessments lead to unclear goals and violated the transition requirements of 34 CFR §300.320(b).**

Issue 6: Did the District err by failing to determine appropriate PLAAFPs and measurable goals for reading and math for Student's April 15, 2013 IEP?

Complainant alleges Student's PLAAFPs were not meaningful and therefore Student's resulting goals are ineffective. An IEP must include a statement of the student's PLAAFPs including how the child's disability affects their involvement and progress in the general education curriculum. 34 CFR § 300.320(a)(1). PLAAFPs are set out to further goal development. An IEP begins by measuring the student's present level of performance which provides a benchmark for measuring the student's progress toward the goals stated in the IEP. *Ravenswood City School District v. J.S.*, 870 F.Supp.2d 780, 790 (N.D. Ca. 2012) citing *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 508 n. 1 (9th Cir.2004).

⁶ Student's 2013-14 post-secondary goals are as follows:

1. After high school, [Student] will receive training in an area of interest and self employment.
2. After high school, [Student] will be self-employed in a family based business.
3. After high school, [Student] will be independent in preparing her 3 daily meals as measured by doing 67% of the tasks on a visual sequencing strip.

Student's 2013 IEP contains the Service Area of **Reading** as follows:

PLAAFP: [Student] has worked on learning her Survival signs and has been able to identify 43 of them. This surpasses her goal of 15 from the year before. [Student] has struggled with paying attention the last few months, more so than the beginning of the year. We have not been able to get an accurate count lately of how many signs she knows. [Student] listens to other students read stories and [Student] is about 60% correct on yes/no questions.

Goals:

- [Student] will be able to recognize at least 50 survival signs that are applicable to [Student] by pointing as measured by teacher data collection.
- After hearing a selection of less than 200 words, [Student] will answer 4 out of 5 comprehension questions in a yes/no format with 70% accuracy.

Student's 2012 reading goal was to identify 15 survival signs *and* be able to effectively use those signs in the community appropriately. For example, if Student sees a restroom she would know which one is the women's restroom so she can enter the appropriate restroom. She was able to receptively identify 43 signs but unable to use them appropriately in the community. It is unclear that the District has determined what Student can do in the area of reading. The former District determined Student could read sight words. However, the investigation revealed the District is not clear what Student currently knows. The first reading goal is incomplete. It does not indicate how Student will recognize the signs. Is Student presented 4 or 5 possible signs in which she is supposed to select the correct one? Although the second goal is measurable, the investigation revealed Student has difficulty with yes/no questions and under her communication goal she was working on learning or re-learning the difference between yes/no. Given this conflicting information the District could not tell whether Student has the ability to comprehend a story and then understand how to answer yes/no question.

Student's 2013 IEP contains the service area of **Math** as follows:

PLAAFP: [Student] was asked to get one spoon and got a pancake turner. She was asked again and got a slotted spoon. When asked for two bowls, she got a metal pancake turner. Asked for two bowls again, she got one and then another. When asked [for] 4 plates, she got more bowls twice. When the bowls were removed, she grabbed a stack of 6 plates without looking at how many she was grabbing. When asked for 5 forks, she got one. When asked again, she brought a handful but didn't count. She could mimic me when I counted for her, but not count alone. [Student] loves to cook and would benefit from learning as much as she can in the kitchen. [Student] practices using a calculator and often confuses the 9s and the 6s. She doesn't understand adding, but wants to do her work. Fives and 2s are also confusing. [Student] needs more practice doing a dollar over to identify correct handling of money.

Goals:

- When asked to count out a number of common kitchen items or ingredients, [Student] will give the correct amount 70% of the time.
- Using the dollar over concept, [Student] will recognize if she has enough money to pay for an item 50% of the time.

The Math PLAAFP does not describe Student's present math level. It appears from the PLAAFP she is unable to count independently and she cannot recognize the numbers 5 or 2 and doesn't understand

adding. Student's 2012 math goals included recognizing coins and telling time to the hour. However, these goals were not met and were eventually determined to be too difficult for Student. The first math goal is vague and unclear as to how many items Student will be asked for. What numbers are being worked on? The second math goal is also vague and unclear. What amounts of money will Student be working on for the dollar-over concept?

A baseline is primary to enable drafting appropriate goals that are measurable. The investigation revealed no significant documentation to demonstrate Student's present levels. The 2013 PLAAFPs in reading and math do not describe Student's present level of functioning. The IEP must also specify how a student's progress toward meeting the goals will be measured. 34 CFR §300.324(a)(3). With the exception of the reading comprehension goal, (b), the reading and math goals are vague and not measurable, thus failing to meet minimum standards under the IDEA. Without proper PLAAFPs, it is impossible to draft appropriate goals and have a starting point from which to measure them. *See Ravenswood City School District*, 870 F. Supp.2d at 790-791. The **District is in violation of 34 CFR § 300.201(a)(1) and 34 CFR §300.324(a)(3)** by failing to provide appropriate PLAAFPs and measurable annual goals in the areas of reading and math.

Issue 7: Was Student's 2013 IEP reasonably calculated to provide educational benefit?

Complainants allege Student's 2013 IEP was not reasonably calculated to provide Student with education benefit as required to provide a free appropriate public education (FAPE). FAPE means special education and related services that:

- (a) are provided at public expense, under public supervision and direction, and without charge;
- (b) meet the standards of the state educational agency;
- (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) are provided in conformity with an individualized education program (IEP).

34 CFR §300.17. The proper standard to determine whether a student with a disability has received FAPE, is the "educational benefit" standard. *J.L v. Mercer Island School Dist.*, 592 F.3d 938,951 (9th Cir. 2010). The district must confer at least "some educational benefit" on students with disabilities. *Id.* This standard is referred to as "a basic floor opportunity" not a "potentially maximizing education." *Id.* at 947 citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 197 (1982).

The District does not have to provide Student with the most potentially maximizing education available. In order to provide FAPE it only has to be shown that some educational benefit was conferred. An IEP cannot be judged exclusively in hindsight, "In striving for 'appropriateness,' an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was drafted." *Adams v. State of Oregon*, 195 F.3d 1141, 1149(9th Cir. 1999) (*quoting Fuhrmann v. East Hanover Bd. Of Educ.*, 993 F. 2d 1031, 1041 (3rd Cir. 1993)(citations omitted)). In a Third Circuit case that is instructive here, *McCallion v. Mamaroneck Union Free School District*, 2013 WL 237846, 9 (S.D.N.Y.), the court looked to several factors to determine if the IEP was reasonably calculated to provide educational benefit: the student received passing marks progressing from grade to

grade, test results indicate student maintained overall achievement level when compared to same age peers, meaningful academic progress made pursuant to past IEPs, and that the proposed IEP contains several recommendations and accommodations not found in past IEPs which were aimed at improving student's performance.

Regarding Student's progress, the District responded that given Student's "...rate of absenteeism, it is not possible to show great progress toward goals with any student." During the 2013-2014 school year Student was absent a significant number of days. She attended school an average of 42%. She was absent 80 days during the first three quarters. Of these 80 days, approximately half were medically excused absences. Other absences were due to the District principal excusing Complainant from school because the District could not provide her with transportation for much of the first two months of the school year as discussed in Issue 2. After that, attendance was sporadic through the rest of the fall. Student did not attend school the majority of the days when transportation was not offered because Complainant was unable to get Student's wheelchair out of the car and over the lip in the doorway at school due to Complainant's shoulder injuries.⁷

Student was mainly educated in the special education classroom with the exception of band class. Student did pass from 9th to 10th grade. However, the 2012 progress reports are contradictory. They indicate Student met her 2012 reading goal of identifying **and** using survival signs in the community 90% of the time. They also state she was only able to identify the signs, **not** use them out in the community. The progress notes indicate Student met her 2012 communication goal of initiating two requests during the school day. However, this directly conflicts with the 2013 PLAAFP which states she does not initiate requests. She did meet her 2012 physical therapy goals. However, in 2013 these goals were a source of great contention between the parties due to different perceptions of Student's mobility and Complainant signed the 2013 IEP with an exception to the physical therapy goal.

As previously discussed, Student was not properly evaluated in all areas of disability. Student was difficult to assess and may even regress due to her Rett's Syndrome diagnosis. However, the District did not take the necessary steps to identify Student's current abilities, which made it difficult to determine how to provide her with a free and appropriate public education.

Student's communication, reading and math PLAAFPs, measurable goals, and transition assessments were deficient as discussed above. The last progress report for 2013 IEP dated February 24, 2014 did not indicate any goals have been met. The investigation revealed very little data or assessment over the course of 2013-2014 school year making a determination of progress more than difficult. Additionally, the District had planned to use the limited English proficiency evaluation to determine if Student should be enrolled in a general education Spanish class but did not do so. The Spanish classroom was not accessible to Student due to her use of a wheelchair, so she did not participate in classroom interaction. There was no mention of Spanish class in the 2013 IEP. The teacher's September 3, 2013 notes state she spoke with Complainant about Spanish and Complainant agreed to have the one-on-one aide teach her her Spanish under the direction of the Spanish teacher. The one-on-one aide at some point concluded Student did not understand Spanish. The level of Spanish fluency was never clarified and the IEP contained no goals addressing Spanish. Further, the April 15, 2013 IEP notes indicated the IEP team would meet to determine an appropriate Spanish goal but the team failed to do so.

⁷ Student did not attend school approximately 37 days in September, October and November.

Given the significance of procedural and substantive violations set forth above, the 2013 IEP was not reasonably calculated to allow Student to receive educational benefit and the **District denied Student a FAPE in violation of 34 CFR §300.17.**

E. Disposition

The District is ORDERED to take the following actions:

1. Should Student return to the District, the District shall promptly notify the Office of Public Instruction and consistent with this Final Report shall:
 - a. identify and perform appropriate assessments for Student;
 - b. clarify Student's mobility status and abilities with appropriate medical professionals and incorporate those services into her IEP;
 - c. incorporate transportation as a related service into her IEP; and
 - d. submit Student's new IEP to this office for approval.
2. The District owes compensatory services to Student sufficient to compensate for the failure to provide a FAPE from August 28, 2013 through April 7, 2014 adjusted for absences for which the District was not responsible and taking into consideration the degenerative nature of Student's Rett's Syndrome. Student has moved to an out-of-state district. In lieu of direct services, the District shall reimburse providers identified by Complainant for the equivalent of 100 hours of professional services for OT, PT, assessments, tutoring, or other professionally identified services or AT devices at an average rate of \$40 per hour for a maximum of \$4000 to compensate for the denial of FAPE. **Complainant shall arrange for the services and notify the District who shall make arrangements with the providers for prompt reimbursement of services provided.** The deadline for arrangement and completion of compensatory services is **April 24, 2015.**
3. The District shall submit a training curriculum and provide training by an OPI-approved trainer or OPI staff on the topics of **timely reevaluation, drafting adequate PLAAFPs and measurable goals, tracking and reporting progress, meaningful data gathering, identifying and performing adequate assessments, transition assessments and services, identification of communication needs and how to provide adequate and effective assistive technology devices and services.** Training shall be provided to all special education personnel and administrators, and verification of completion of the training and attendance shall be provided to OPI by **September 15, 2014.**
4. The District shall review their policies and practices with regard to conducting **reevaluations**, and with regard to **transportation as a related service** to ensure compliance with this Final Report. **By September 15, 2014,** the District shall inform the Dispute Resolution Office with any proposed changes or modifications for approval.
5. The District shall review the IEPs of all District students who "require assistive technology devices or services" as identified on their IEP and shall review and adjust the needed devices or services consistent with this Final Report. **By October 25, 2014,** the District shall provide a confidential list of these files

and state the action taken with regard to each file. The OPI will review the list and order any further remedial measures deemed necessary.

Ann Gilkey
OPI Compliance Officer

c: Mary Gallagher, Dispute Resolution/EAP Director
Frank Podobnik, State Special Education Director
Laurence R. Martin, Felt, Martin, Frazier & Weldon, PC